Coastal Derby Refining Co. *and* Oil, Chemical and Atomic Workers International Union, Local 5-241, AFL–CIO. Case 17–CA–15477

September 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 28, 1992, Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Coastal Derby Refining Company, El Dorado, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Unilaterally changing unit health insurance benefits without first notifying and bargaining with a union that is the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit.''

2. Substitute the following for paragraph 2(a).

''(a) Rescind the unilateral changes in health insurance benefits for working spouses and reinstate the insurance benefits for working spouses in effect prior to the January 1, 1991 change; and make whole bargaining unit employees for any losses they may have suffered as a result of the January 1, 1991, changes in the health insurance coverage for working spouses with interest, until the exclusive bargaining representative was decertified.''

3. Substitute the attached notice for that of the administrative law judge.

[1] On August 31, 1992, the Oil, Chemical and Atomic Workers International Union, Local 5-241, AFL–CIO was decertified as the exclusive bargaining representative of the unit employees. The Respondent has excepted to extending the affirmative relief for the failure to bargain beyond the Union's decertification. The General Counsel does not object to this modification. In these circumstances, we consider it inappropriate to order the Respondent to bargain with the Union, notwithstanding that we have found that the Respondent acted unlawfully when it failed to bargain with the Union at a time when the Union was the representative. Accordingly, we shall modify the recommended Order. See *Celebrity, Inc.*, 284 NLRB 688 (1987).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change health insurance benefits without first notifying and bargaining with an incumbent union which is the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All temporary, probationary, and regular employees in maintenance and operations employed at our El Dorado, Kansas, facility but excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral changes in health insurance benefits for working spouses and reinstate the insurance benefits for working spouses in effect prior to the January 1, 1991 change; and make whole bargaining unit employees for any losses they may have suffered due to the January 1, 1991 changes in the health insurance coverage for working spouses with interest, until the exclusive bargaining representative was decertified.

COASTAL DERBY REFINING COMPANY

Constance N. Traylor, for the General Counsel.
Kathleen A. Hostetler, of Lakewood, Colorado, for the Respondent.
Mark J. Tempest, of Houston, Texas, for the Employer.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. I heard this case in Wichita, Kansas, on October 2, 1991, pursuant to a complaint which issued on April 24, 1991. The complaint alleges that the Respondent implemented a change in the medical and dental plans covering unit employees represented by the Union without affording the Union an opportunity to negotiate and bargain about the change and its effects. While admitting the implementation of the change, the Respondent denies it committed an unfair labor practice and argues it was not required to notify or bargain with the Union because (1) the change was made by the plan administrator, (2) it was required to maintain the preunion status quo respecting the expectation of upcoming benefits created by the Employer either by promises or a regular pattern of granting benefits, and (3) the Union continually avoided and delayed

negotiations. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel, with whom the Union joined, filed a brief, as did the Respondent. Both have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Coastal Derby Refining Company is engaged in the operation of an oil refinery in El Dorado, Kansas. During the year ending March 1, 1991, in the course and conduct of its operations, it sold and shipped products, goods, and materials valued in excess of $50,000 directly to points outside the State of Kansas. It is admitted and found that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that Oil, Chemical and Atomic Workers International Union, Local 5-241, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The events giving rise to this proceeding have their origin in the 10th Circuit Court of Appeal's decision, 915 F.2d 1448 (1990), enforcing the Board's Decision and Order in 292 NLRB 1015 (1989), finding Coastal Derby to be the successor to Pester Corporation and in violation of Section 8(a)(5) by refusing to recognize and bargain with OCAW after it took over the operation of the El Dorado refinery in 1986.[2] The facts in the earlier case reveal that the Pester Corporation had owned and operated the El Dorado refinery from 1977 until 1986 and that the refinery employees there had been represented by the Union since the 1940s and that the Union was their representative when the Pester Corporation purchased the facility. The Pester Corporation and OCAW were bargaining on a successor contract at the time Respondent Coastal Derby took over. Following the refusal to recognize it as the collective-bargaining representative of the employees in the El Dorado facility, OCAW filed the December 24, 1986 charge against Coastal Derby which resulted in the above-mentioned 10th Circuit decision enforcing the Board's Order. Thus, it is seen that from October 13, 1986, when it demanded recognition, until mid-October 1990, Respondent Coastal Derby unlawfully refused to recognize the OCAW, the employees' collective-bargaining representative.

B. *Respondent Recognizes OCAW*

The first knowledge OCAW had that Respondent would acknowledge it as the representative of the refinery employees was through an employee after Respondent notified the employees through an ''interoffice correspondence'' dated October 11, 1990, that the 10th Circuit had ruled it to be the successor to Pester and obligated to bargain with OCAW, and that it would comply with the court's decision. No notice to this effect had been sent by Respondent to the Union that it would comply with the court's decision. John Dykes, the Union's International representative in charge of servicing the refinery, testified that he was surprised at the Employer's concession in recognizing the Union since he had understood the Company intended to appeal to the United States Supreme Court in the event it lost before the 10th Circuit. In any event, the first effort to contact the other party was made by Dykes who left a message for the plant manager, who was not available at the time, to call him back. The call was returned on October 15, 1990, by Robert Sanders, director of industrial relations for Coastal States Management Corporation, which, along with Coastal Derby and other unnamed entities, are subsidiaries of Coastal States Corporation. Sanders is the chief labor negotiator for all of the subsidiaries and as such provides labor relations administrative services and functions as the chief negotiator for Respondent. Sanders informed Dykes that the Employer was prepared to recognize and negotiate with the Union. Dykes requested pertinent information regarding the employees and their benefits and stated that as the designated representative of the employees, he was the one to be contacted on anything concerning their wages, hours, and other conditions of employment. Not yet having a list of current employees, the Union took an old list which it attempted to bring up to date with the help of a couple of union members, and sent them a letter dated October 16, 1990, advising them of a meeting to be held October 22 for the purpose of rebuilding an organization in the plant. Dykes testified that since the Company had refused to recognize the Union for 4 years, there was no union structure within the plant, there were no union stewards, and some of the employees were apprehensive about the Union and under the misconception that they might be replaced by former Pester employees. In addition, a number of the letters announcing the meeting were returned. Consequently, attendance at the meeting was small.

On October 24, Dykes wrote Sanders confirming the substance of their October 15 telephone conversation and requested a current list of all unit employees and copies of all benefit plans by November 15. On November 5, Sanders wrote Dykes stating the requested information would be forwarded as soon as completed and suggested November 27 or 28 as dates to commence bargaining. The information was transmitted to Dykes with Sanders' letter of November 16.

By letter to employees dated November 8, the Union announced two meetings on November 12 at the Red Coach Inn in El Dorado to answer any questions they might have. The employees who attended the November 12 meetings focused on the Pester bankruptcy, the closing of the plant, the litigation that culminated in the 10th Circuit decision, and fear that former Pester employees might displace the current

[1] The parties stipulated to the receipt in evidence of the transcript and exhibits in Case 17–CB–4064, which I heard on October 2, 1991, immediately preceding this case. In the decision in that case, which is being issued contemporaneously with this one, I found that the Union did not engage in 8(b)(3) conduct. I therefore recommend dismissal of the complaint.

[2] Coastal Derby's compliance with the Board's notice-posting requirement was completed in January 1991.

employees. Because of the concerns expressed by the few that attended the meetings, the Union arranged for the attorney that had represented Pester in the bankruptcy proceedings and a staff attorney for the International to be present at a special meeting to be held at the union hall in El Dorado on November 27. While attendance at that meeting was better than at the earlier ones, the Union decided to make house calls in order to communicate its message to employees. Many employees, according to Dykes, were new and had never been exposed to the Union.

In early January 1991, a couple of employees of Coastal Derby notified the Union that the Company had made a change in the medical and dental benefit plans. The changes in the medical and dental plans included, inter alia, the elimination of primary coverage for the employee's working spouse who is eligible for group medical/dental coverage offered by the working spouse's employer. The Respondent had notified the employees—but not OCAW—of the change in the benefit plans by letter of December 6, 1990. Darlene Shull, employee relations manager for Respondent, testified she received a copy in the office on December 6 and at her home about December 9, which constituted her first knowledge of the changes which were to become effective January 1, 1991. Along with an assistant, Shull made several presentations regarding the changes to employees on December 17. Dykes was not invited to the presentations nor was the need to include a union representative discussed. She testified that while it had been the practice to follow the Coastal Corporation benefit plans, and amendments, the Respondent could suggest amendments to the Coastal Corporation, and in fact the Wichita refinery, whose employees are represented by another OCAW local, is not an adopting employer of the Coastal Corporation health benefit plans. Rather, its health benefits are governed by the collective-bargaining agreement with OCAW Local 5-446. Sanders confirmed that the Coastal Corporation plan was not put into effect at any of the affiliated plants whose employees are represented by labor organizations. Robert De Moss, senior attorney for Coastal Management Corporation, testified that section 8 of the benefit plan provides that an adopting employer, such as the Respondent, is automatically bound to amendments unless it notifies Coastal Corporation within 90 days that it does not wish to be bound by the amendment.

Following an arbitration hearing on January 11, 1991, in Wichita concerning another unit, Dykes brought up the changes which had been made without the Union's knowledge. This was followed by his January 25, 1991 letter to Sanders demanding bargaining on the issue and offering to do so prior to general negotiations. By letter dated February 7, 1991, Sanders informed Dykes that,

> The changes . . . are not the result of any action unilateral or otherwise by Coastal Derby Refining Company, but were instead made by the Coastal Corporation as the administrator of the benefit plans in question. As an adopting employer of those plans, Coastal Derby-El Dorado is automatically bound by amendments made by the Administrator unless it notifies the Administrator in accordance with the terms of the plan that it rejects the amendment. The Company can, subject to acceptance by the Administrator submit its own modification to the plan.

Thus it is seen then on both January 11 and 25, 1992, it was possible under the plans for the Respondent to have avoided automatic coverage by the amendments. No objection to the plan was ever made by the Respondent to the plan's administrator. Rather taking the position that it had not made a unilateral change, Sanders reiterated the Company's offer to bargain on all issues but ''that there is no need to discuss any single issue . . . .'' He proposed general negotiations commence February 26. Dykes responded on February 22 that while the Union was not yet prepared to commence general negotiations, it was ''certainly willing to meet to negotiate on any specific changes the Company feels need to be made prior to such changes being implemented.'' On February 25, the Union filed the charge in this case and the complaint issued on April 24, 1991.

Discussion

The Respondent admits that it implemented a change in the medical and dental plans covering the unit employees represented by the Union, and it is clear the changes were made without prior notice to the Union. It is further clear that Respondent could have rejected the proposed changes in the plans or could have suggested alternative amendments. Thus, the medical and dental plans were subjects over which the Respondent could have bargained with the Union. In this regard, no union-represented employees of any of the other subsidiaries of Coastal Corporation are covered by the Coastal Corporation plan. Rather, their benefits are negotiated with their collective-bargaining representatives.

It is well grounded in Board and court law that health benefit plans are a mandatory subject of collective bargaining and that they may not be altered or eliminated without bargaining to mutual agreement or to a good-faith impasse on such action. In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that an employer violated the duty to bargain collectively imposed by Section 8(a)(5) of the Act by unilaterally changing conditions of employment, stating at 743,

> A refusal to negotiate *in fact* as to any subject which is within Section 8(d), and about which the union seeks to negotiate, violates Section 8(a)(5) though the employer has every desire to reach agreement with the union upon an overall collective agreement and in all good faith bargains to that end. . . . for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.

It being clear from the evidence that the proposed change in the benefit plans was subject to change by the Respondent, and could have been changed had the Respondent notified the Union of the proposal, having found in Case 17–CB–4064 that the Union did not in indulge in dilatory tactics in violation of Section 8(b)(3), and having considered and found no merit to the Respondent's argument that it was required to maintain the dynamic status quo respecting the expectation of upcoming benefits, it is found, as alleged in the complaint, that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing a change in the Coastal Corporation Medical Plan and the Coastal Corporation Dental Plan covering unit employees by ceasing to pay for primary

coverage for a unit employee's working spouse who is eligible for group medical coverage offered by the working spouse's employer, without having afforded the Union an opportunity to negotiate and bargain with respect to such acts and conduct and the effects of such acts and conduct.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material to the proceeding, Oil, Chemical and Atomic Workers International Union, Local 5-241, AFL–CIO has been the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All temporary, probationary, and regular employees in maintenance and operations employed at Respondent's El Dorado, Kansas facility but excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

4. By unilaterally implementing a change in the Coastal Corporation Medical Plan and the Coastal Corporation Dental Plan, Respondent Coastal Derby Refining Company committed unfair labor practices within the meaning of Section 8(a)(5) and (l) of the Act.

5. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Coastal Derby Refining Company, El Dorado, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively within the meaning of the Act with Oil, Chemical and Atomic Workers International Union, Local 5-241, AFL–CIO as the exclusive collective-bargaining representative of its employees in the appropriate unit, by unilaterally changing the Coastal Corporation Medical Plan and/or the Coastal Corporation Dental Plan.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the Coastal Corporation Medical and Dental Plan coverages provided to unit employees before it was unilaterally changed, and make the employees whole for any losses which they may have suffered, and for any direct expenses which they may have been required to bear as a result of the unilateral changes.

(b) Post at its El Dorado, Kansas facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''